

FILED

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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GILBERTO HERRERA-VARGAS,

Defendant - Appellant.

No. 04-50248

DC No. CR 04-0018 NAJ

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Submitted October 18, 2005**
Pasadena, California

Before: KLEINFELD, TASHIMA, and FISHER, Circuit Judges.

Defendant Gilberto Herrera-Vargas (“Herrera”) was indicted for being a
deported alien found in the United States, in violation of 8 U.S.C. § 1326. He

* This disposition is not appropriate for publication and may not be cited to or
by the courts of this circuit, except as provided by Ninth Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral
argument. See Fed. R. App. P. 34(a)(2)(C).

pleaded guilty to the single-count indictment and received a 77-month sentence, including enhancements for prior convictions and criminal history. He appeals his sentence on the grounds that: (1) the 16-level enhancement under § 2L1.2(b)(1)(A)(ii) of the United States Sentencing Guidelines (“U.S.S.G.”) violated his Sixth Amendment rights under Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004); and (2) the district court imposed the enhancement without making factual findings about Herrera’s status of probation, parole, or supervised release, also in violation of Blakely.

Herrera’s first argument fails because the application of a § 2L1.2 enhancement does not violate Apprendi and Blakely; those cases carve out an express exception for the fact of a prior conviction. See United States v. Quintana-Quintana, 383 F.3d 1052, 1052-53 (9th Cir. 2004) (citing Apprendi, 530 U.S. at 490, and noting that Blakely expressly preserves the holding of Apprendi).

Herrera next argues that the district court improperly relied only on the Pre-Sentence Investigation Report when imposing criminal history points pursuant to U.S.S.G. § 4A1.1(d), and argues that the factual question of whether he was on probation, parole, or supervised release should have been submitted to a jury.

While Herrera argues that the district court’s § 4A1.1(d) fact-finding constituted a violation of Blakely, we conclude that his argument is more akin to a Shepard-type

argument, Shepard v. United States, 125 S. Ct. 1254 (2005), which was decided after Herrera filed his brief with this Court. Herrera has conceded, however, that Shepard is inapplicable to the facts of this case. We therefore need not reach the merits of this argument. See United States v. Andaverde, 64 F.3d 1305, 1312 n.6 (9th Cir. 1995).

Finally, the sentence in this case was imposed before the Supreme Court's decision in United States v. Booker, 125 S. Ct. 738 (2005), under the assumption that the Sentencing Guidelines were mandatory. Because, on this record, we cannot tell "whether the sentence imposed would have been materially different had the district court known that the sentencing guidelines were advisory," United States v. Ameline, 409 F.3d 1073, 1074 (9th Cir. 2005) (en banc), we remand the sentence to the district court for its reconsideration and possible re-sentencing in accordance with the procedures set forth in Ameline, see id. at 1084-85.

SENTENCE REMANDED.